

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Application for a Notary
Commission and the Insurance
Producer's License of Connie Gustafson

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson on October 19, 2010, at the Office of Administrative Hearings in St. Paul, Minnesota. The OAH record closed at the conclusion of the hearing that day.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (Department).

James Heuer, Attorney at Law, appeared on behalf of Respondent, Connie Gustafson.

STATEMENT OF THE ISSUES

The following issues are presented in this matter:

1. Should the Respondent's application for a notary commission be denied under Minn. Stat. §§ 45.027, subd. 7, 359.01, subd. 4, or 359.12,¹ because she submitted an incomplete and false application or committed acts involving dishonesty and financial irresponsibility?
2. Should the Respondent's insurance producer license be disciplined or should she be censured or subject to a civil penalty under Minn. Stat. §§ 45.027, subd. 7, 60K.37, or 60K.43, subd. 1(1), (3), and (8), because she submitted a misleading, false, incorrect, incomplete or materially untrue licensing application; obtained a license through misrepresentation or fraud; committed acts involving fraud and dishonesty; or demonstrated untrustworthiness?

Based upon the record in this matter, the Administrative Law Judge makes the following:

¹ Unless otherwise specified, references to Minnesota Statutes are to the 2008 edition.

FINDINGS OF FACT

1. The Respondent, Connie Gustafson, has been licensed as an insurance producer since November 25, 2009, under License No. 40186771.²

2. On or about December 12, 2009, the Respondent submitted an application to the Office of the Secretary of State for a Notary Commission.³ The Notary Commission Application form contained the following question:

Have you ever been charged with, or convicted of, or been indicted for, or entered a plea to, any criminal offense (felony, gross misdemeanor or misdemeanor), in any State or Federal Court? **(If yes, attach written explanation and copies of complaint, sentencing and disposition documents, and if currently on probation, attach letter from probation officer stating compliance with terms of probation.) Note: This does NOT include traffic violations such as DUI, DWI, speeding, etc.**⁴

The Respondent checked the box marked “yes.” She provided a print-out of the results of a Criminal/Traffic/Petty Case records search dated December 14, 2009, with her application form and also provided an executed form authorizing the Bureau of Criminal Apprehension to conduct a criminal background check.⁵

3. According to the Criminal/Traffic/Petty Case Records Search Results provided with the Respondent’s application, her non-traffic-related criminal history is comprised of the following:

- a 1994 charge in Hennepin County for “theft by check;”
- a 2003 charge in Scott County for “check forgery” and “offering a forged check;” and
- a 2005 charge in Dakota County for “offer[ing a] forged check.”⁶

4. Because the Respondent checked “yes” in response to the criminal history question, the Office of the Secretary of State submitted her application to the Department of Commerce for further review. The matter was assigned to Bruce Duncan, Senior Investigator for the Department of Commerce.⁷

5. The Department ultimately denied the Respondent’s notary application.⁸ The letter notifying the Respondent of the reasons for the denial of her application was

² Testimony of Bruce Duncan; Exhibit 1.

³ Ex. 2.

⁴ Ex. 2 at question 3 (emphasis in original).

⁵ Ex. 2.

⁶ *Id.*

⁷ Testimony of B. Duncan.

⁸ Testimony of B. Duncan.

not submitted into evidence. The Department contended at the hearing that denial of the application was appropriate because the application was incomplete and misleading due to the Respondent's failure to provide supporting documentation regarding her criminal history. The Department also asserted that the application should be denied because the Respondent's criminal history involves issues of dishonesty and financial impropriety.⁹

6. The criminal history disclosed with Respondent's notary application caused the Department investigator to look into what, if any, criminal history had been disclosed by the Respondent at the time she applied for her insurance producer license in November of 2009.¹⁰ In connection with its investigation of this issue, the Department did not examine the handwritten insurance producer license application that the Respondent had submitted at that time. Instead, the Department investigator merely reviewed a typewritten print-out entitled "Review/Update Producer Application" which provided certain information concerning the Respondent's insurance producer license and purported to reflect the responses the Respondent had given to questions asked on the application form regarding criminal history, bankruptcy history, and other matters.¹¹

7. The "Review/Update" print-out reviewed by the Department investigator indicated that the Respondent had answered "no" to the following question on her insurance producer application:

Have you ever been charged, indicted, pleaded to, or convicted of any criminal offense in any Court? Include any felony, gross misdemeanor or misdemeanor; do not include misdemeanor traffic violations. If yes, you must submit to the Department: a) a written statement explaining the circumstances of each incident; b) a copy of the charging document; c) a copy of the official document which establishes the resolution of the charges or any final judgment, and d) if currently on probation, attach letter from probation officer stating your compliance with terms of probation.

The "Review/Update" print-out further indicated that the Respondent had answered "yes" to the following question:

Have you ever been subject to a bankruptcy proceeding? If yes, you must submit a signed and dated Discharge of Debtor Document summarizing the details of the indebtedness and arrangements for repayment, before your application will be processed.¹²

8. Based solely on the "Review/Update" form, the Department concluded that the Respondent had not disclosed her criminal history at the time she applied for her insurance producer license, and recommended that disciplinary action be taken.

⁹ Testimony of B. Duncan.

¹⁰ Testimony of B. Duncan.

¹¹ Ex. 1; Testimony of B. Duncan

¹² Ex. 1; Testimony of B. Duncan.

9. The Department investigator does not know who prepared the “Review/Update” form and is not familiar with the process that is typically followed to prepare such forms. He is not sure whether the form was prepared by the Respondent or a Departmental employee.¹³ In fact, the Respondent did not prepare the “Review/Update” form.¹⁴ Because the form refers to Peggy Koecheler as the “responsible staff member,”¹⁵ and Ms. Koecheler is an employee of the Department of Commerce,¹⁶ it is likely that the form in fact was prepared by the Department as a summary of the original application form submitted by the Respondent and as part of the process triggering a further review of an application based upon an affirmative answer to one of the questions on the application. Neither Ms. Koecheler nor anyone else familiar with the Respondent’s original application or the process followed in preparing the “Review/Update” form testified on behalf of the Department.

10. At the time the Respondent applied for her insurance producer license in November, 2009, she printed out an application form from the Department’s website, filled it out by hand, and submitted the handwritten form to the Department. The Respondent testified that she checked the “yes” box on the form in response to the criminal history question quoted above, and submitted a completed criminal background check form along with her application. The Respondent also answered “yes” to the question quoted above which asked if she had ever been subject to a bankruptcy proceeding.¹⁷

11. On November 23, 2009, the Respondent supplemented her insurance producer license application with a letter in which she explained that she had considered bankruptcy in 1995-1996, but she had not followed through with the filing of the bankruptcy petition because her financial situation had improved.¹⁸ The Respondent’s insurance producer license was subsequently granted on November 25, 2009.¹⁹

12. On May 27, 2010, the Department served a Notice of and Order for Hearing, Order to Show Cause, Order for Prehearing Conference, Statement of Charges, and Order Denying License Application in this matter on the Respondent.

13. The Notice of Hearing notified the parties that a prehearing conference would be held on July 22, 2010.²⁰ At the prehearing conference, the hearing was scheduled to be held on September 16, 2010. At the request of the Respondent, the hearing was later continued to October 19, 2010. The hearing was held as scheduled on that date.

¹³ Testimony of B. Duncan.

¹⁴ Testimony of C. Gustafson.

¹⁵ Ex. 1 at 1.

¹⁶ Testimony of B. Duncan.

¹⁷ Testimony of C. Gustafson.

¹⁸ Ex. 1.

¹⁹ *Id.*

²⁰ Notice of Hearing at 1.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 45.027, 60K.43, 359.01, and 359.12.

2. The Notice of and Order for Hearing, Order to Show Cause, Order for Prehearing Conference, Statement of Charges, and Order Denying License Application was proper, and the Department has complied with all relevant procedural requirements.

Application for Notary Public Commission

3. The Governor appoints and commissions citizens as notaries public; the Minnesota Secretary of State receives applications and keeps a register of notaries; and the Commissioner of Commerce administers the requirements applicable to notaries that are set forth in Chapter 359.²¹

4. The statutes governing notaries public specify that the application form “may request personal information about the applicant, including, but not limited to, relevant civil litigation, occupational license history, and criminal background, if any.” It further states that the term “criminal background” includes, but is not limited to, “criminal charges, arrests, indictments, pleas, and convictions.”²²

5. The Commissioner of Commerce may deny an application for a notary commission if the Commissioner finds that such a denial is in the public interest and that the applicant “has provided false, misleading, or incomplete information to the Commissioner” or “has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant . . . is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority . . . granted by the commissioner.”²³

6. With respect to her application for a notary public commission, the Respondent bears the burden to show by a preponderance of the evidence that her application for a notary commission should be granted.²⁴

7. The Respondent has shown by a preponderance of the evidence that she did not violate Minn. Stat. § 45.027, subd. 7(a), by providing false or misleading information in connection with her notary application.

²¹ Minn. Stat. §§ 45.011 and 359.01.

²² Minn. Stat. § 359.01, subd. 4.

²³ Minn. Stat. § 45.027, subd. 7(a).

²⁴ Minn. R. 1400.7300, subp. 5.

8. The Respondent has not shown by a preponderance of the evidence that she complied with Minn. Stat. § 45.027, subd. 7(a), by providing complete information relating to her criminal history. Although the Respondent's application included a list of offenses and a BCA background check authorization form and the Respondent also provided some explanation of the circumstances involved in the 1994, 2003, and 2005 offenses during her hearing testimony, she has not provided all of the information that notary applicants are required to provide (such as a written explanation; copies of complaint, sentencing, and disposition documents; and, where applicable, a letter from her probation officer stating compliance with the terms of probation). Under the circumstances, it is proper to deny her application for lack of completeness.

9. Due to the lack of complete information relating to her criminal history, the Respondent has not shown by a preponderance of the evidence that she is trustworthy, truthful, financially responsible, and qualified to hold a notary public commission.

10. The Respondent should be given an opportunity to supplement her application with the required information relating to her criminal history. Once that information is provided, the Department should reconsider whether or not the Respondent is qualified to hold a notary public commission.

Insurance Producers License

11. Applicants for a resident insurance producer license must submit an application to the Department in which they declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the applicant's knowledge and belief.²⁵ Applicants are also required to consent to a criminal history record check by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation.²⁶

12. Before an insurance producer license application is approved, the Department must determine, among other things, that the applicant "has not committed any act that is a ground for denial, suspension, or revocation set forth in section 60K.43 [of the Minnesota Statutes]"²⁷

13. Grounds for denial, suspension, or revocation of an insurance producer license or imposition of a civil penalty include "providing incorrect, misleading, incomplete, or materially untrue information in the licensing application;"²⁸ "obtaining or attempting to obtain a license through misrepresentation or fraud;"²⁹ or "using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility whether or not involving the business of insurance in this state or elsewhere."³⁰

²⁵ Minn. Stat. § 60K.37, subd. 2.

²⁶ Minn. Stat. § 60K.37, subd. 2a.

²⁷ Minn. Stat. § 60K.37, subd. 2.

²⁸ Minn. Stat. § 60K.43, subd. 1(1).

²⁹ Minn. Stat. § 60K.43, subd. 1(3).

³⁰ Minn. Stat. § 60K.43, subd. 1(8).

14. As the party taking action against the Respondent's current insurance producer license, the Department bears the burden of demonstrating by a preponderance of the evidence that the Respondent has violated applicable statutes or rules and that the imposition of sanctions is appropriate.

15. Due to the Department's failure to review the Respondent's actual application form and its failure to show the validity of its "Review/Update" form, the Department has not shown by a preponderance of the evidence that the Respondent: (a) provided incorrect, misleading, incomplete, or materially untrue information in her application for an insurance producer license, in violation of Minn. Stat. §§ 60K.37 or 60K.43, subd. 1(1); (b) obtained her insurance producer license through misrepresentation or fraud, in violation of Minn. Stat. § 60K.43, subd. 1(3); or (c) engaged in fraudulent, coercive, or dishonest practices or demonstrated incompetence, untrustworthiness or financial irresponsibility, in violation of Minn. Stat. § 60K.43, subd. 1(8).

16. The Department has not shown by a preponderance of the evidence that sanctions should be imposed against the Respondent's insurance producer license.

17. The Memorandum below is incorporated in these Conclusions.

Based upon the foregoing Conclusions, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that Ms. Gustafson's application for a notary public commission be denied for incompleteness and that the application be reconsidered once she provides complete information. The Administrative Law Judge further recommends that the Commissioner of Commerce not impose discipline against the insurance producer license of Connie Gustafson.

Dated: November 18, 2010

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Digital Recording, No Transcript Prepared.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Glenn Wilson, Commissioner, Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101, to learn about the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Application for Notary Public Commission

The Respondent bears the burden to show by a preponderance of the evidence that she is qualified to be a notary public and that her application for a notary commission should be granted. Although the Respondent has shown by a preponderance that she did not provide false or misleading information in connection with her notary application, the Administrative Law Judge has concluded that she has not borne her burden to show that she provided complete information relating to her criminal history.

When she submitted her application, the Respondent checked “yes” in response to the criminal history question and provided a print-out listing a number of her past offenses. She also provided a signed authorization form for a BCA background check, as is required of all applicants. However, the Respondent failed to provide a number of other types of supporting documentation required by the application form. She did not provide copies of the complaints, sentencing, and disposition documents, or a letter from her probation officer stating compliance with the terms of probation. The Respondent provided some explanation regarding the circumstances involved in the

1994, 2003, and 2005 offenses in her testimony during the hearing,³¹ but has not provided the required written explanation.

The Respondent's testimony and supporting materials did not identify the allegations made in the charges that were filed against her, whether the charges were later dropped or if she pled guilty or was convicted of the offense alleged or a lesser crime, what sanctions were imposed, or whether all conditions have been satisfied. This information is particularly important because the charges against the Respondent apparently alleged check forgery and offering forged checks, but the Respondent characterized these situations as involving dishonored checks that were written by her or written by others and deposited into her account. It is not proper for an applicant to merely provide a background check authorization and expect the State to uncover all of the relevant documents.

Because the Respondent has not provided complete information relating to her criminal history, she has not borne her burden to show that she is trustworthy, truthful, financially responsible, and qualified to hold a notary public commission. For that reason, it is recommended that her application be denied. It is further recommended that she be allowed to supplement her application with the required information and that the Department thereafter reconsider whether or not she is qualified to hold a notary public commission.³²

Insurance Producer License

The Department contends that the Respondent failed to disclose her criminal history when she applied for her insurance producer license in November 2009. The Department thus argues that her license should be revoked because she filed a false and incomplete application and obtained her license through misrepresentation or fraud. As the party contending that disciplinary action should be taken against an existing licensee, the Department bears the burden of showing by a preponderance of the evidence that violations of licensing standards occurred and discipline is appropriate.

³¹ The Respondent testified that, in 1994, she wrote a check for \$40.00 at a garage sale, but there were not sufficient funds in her account to cover this check. She was charged with theft by check, but said that no court appearance was ever scheduled. She made restitution to the recipient of the check. In 2003, the Respondent testified that she again wrote a check on her account that was not honored. She indicated that she was charged with felony check forgery/offering a forged check, had to go to court, and ultimately made restitution to the recipient of the check. Finally, the Respondent testified that she deposited a \$400.00 check in her account in 2005 that had been written by another individual. She indicated that that check bounced and triggered a series of insufficient funds checks in the Respondent's account, and the Respondent's bank closed her account. The Respondent said that she was charged with offering a forged check, a misdemeanor, and that she made restitution to the recipients of the checks written on her account that were refused for insufficient funds.

³² The Respondent also contended that she has shown competent evidence of sufficient rehabilitation and present fitness to perform the duties of a notary public under Minn. Stat. § 364.03. That statute requires the production of certain documentary evidence of rehabilitation, such as discharge orders and evidence showing completion of probation. Because this information has not been provided and the record is incomplete with respect to the Respondent's criminal offenses, there is an insufficient basis to determine whether or not the Respondent satisfied these requirements.

The Respondent credibly testified that she did not complete or submit her application for an insurance producer license on-line, but merely printed out the application form, filled it out by hand, and then sent it to the Secretary of State's Office. She testified that she did, in fact, check "yes" in response to the criminal history question. As required by the applicable statute, the Respondent filed a criminal background check authorization form along with her Insurance Producer License application. The fact that the Respondent should have known that the criminal background check would reveal the three non-traffic offenses noted in Finding No. 3 above suggests that the Respondent would have had an incentive to truthfully answer the criminal history question on the application. Moreover, because of the background check requirement, it is likely that the Department was aware of the Respondent's criminal history at the time it granted her insurance producer license.

The Department's investigator, Bruce Duncan, was the only witness called by the Department at the hearing. He admitted that he had not reviewed the handwritten application form that was actually submitted by the Respondent before making his determination that the Respondent had failed to disclose her criminal history. In fact, he acknowledged that he had never seen the Respondent's handwritten application and did not know where it was.

Mr. Duncan based his determination that the Respondent had submitted a false license application entirely upon a "Review/Update" print-out relating to the Respondent's application. Mr. Duncan had not himself entered the information that was printed on the "Review/Update" form, nor did he know whether the Respondent or another Department employee had entered the information. Mr. Duncan agreed that it was possible that the person who had prepared the "Review/Update" form had made an error when he or she indicated that the Respondent had checked "no" in response to the criminal history question. Mr. Duncan testified that he typically would have been provided with any material accompanying an application when he was conducting an investigative review. Because he did not receive any accompanying information relating to Respondent's criminal offenses, he "assumed" that the "Review/Update" form correctly indicated that the Respondent had denied having any relevant criminal history.

No one who was familiar with the Respondent's original application or the process followed in preparing the "Review/Update" form testified on behalf of the Department. As a result, there is no basis for drawing any conclusions regarding the actual procedure that was followed in connection with the Respondent's application or the typical process used. As noted in the Findings above, the Administrative Law Judge concludes that it is likely that the "Review/Update" form in fact was prepared by Department personnel as a summary of the original application form submitted by the Respondent and as part of the process triggering a further review of an application based upon an affirmative answer to one of the questions on the application.

In order to revoke a license, the Department must show by a preponderance of the evidence that the licensee violated applicable laws or rules. Even though the standard in non-attorney professional disciplinary matters is preponderance of the evidence and not clear and convincing evidence, the Minnesota Supreme Court's

decision in *In re Wang* made it clear that the agency must show that its decision is supported by evidence of considerable weight:

Even so these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft. The reputation of a profession and the reputation of a professional as well as the public's trust are at stake.³³

The record in the present case provides no assurance that the information noted in the "Review/Update" form is reliable, or that the handwritten application submitted by the Respondent in fact falsely stated that she had no criminal history. The evidence upon which the Department relied was primarily based on conjecture and assumptions. Bearing in mind the seriousness of the decision to be made, the Administrative Law Judge finds that the evidence presented by the Department is insufficient to meet its burden of proof to show that license revocation is warranted.

B. L. N.

³³ *In re Wang*, 441 N.W.2d 488, 492 (Minn. 1989); see also Findings of Fact, Conclusions and Recommendation in *In the Matter of the Insurance Agent License of Jonathan S. Earley*, OAH Docket No. 10-1004-14395-2 (2002) (applying *In re Wang* standard in disciplinary proceeding against insurance agent).